A **MEGAH TEKNIK SDN BHD**

v.

MIRACLE RESOURCES SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ABU SAMAH NORDIN JCA
WAN ADNAN MUHAMAD JCA
[APPEAL NO: W-02-453-2005]
C 16 DECEMBER 2009

COMPANY LAW: *Winding up - Setting aside - Application to set aside - Winding up order duly perfected and sealed - Whether could be set aside or rescinded - Whether proper remedy to apply for stay under s. 243 Companies Act 1965*
D

This appeal arose from the decision of the High Court dismissing the appellant's application to set aside the winding up order granted against it. The application was based on the ground that the
E appellant had no knowledge of the winding up proceedings as it had handed over the s. 218 notice served on it to a third party who had promised to take the necessary actions to oppose the petition. It was therefore submitted that this was an order made in default and should be set aside. The respondent opposed the application on the
F ground that it was irregular and wrong in law. The winding up order had been duly perfected and sealed. The appellant should have appealed against the said winding up order instead of applying to have it set aside.

Held (dismissing the appeal with costs)
G **Per Abu Samah Nordin JCA delivering the judgment of the court:**

(1) A winding up order which had been perfected and duly sealed could not be set aside or rescinded save in those circumstances
H where the court may exercise its inherent jurisdiction. The proper remedy which is provided by the Companies Act 1965 is to apply for a stay under s. 243 as was pointed out in *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* or to appeal against the winding up order as was done in *Sri*
I *Hartamas Development Sdn Bhd v. MBF Finance Bhd.* (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini berbangkit dari keputusan Mahkamah Tinggi menolak permohonan perayu untuk mengenepikan perintah penggulungan yang dibuat terhadapnya. Permohonan berdasarkan alasan bahawa perayu tidak berpengetahuan mengenai prosiding penggulungan kerana ia telah memberi notis s. 218 yang telah disampaikan kepadanya ke tangan pihak ketiga yang telah berjanji mengambil langkah-langkah yang diperlukan untuk menentang petisyen. Oleh itu ia telah dikemukakan bahawa perintah ini dibuat secara ingkar dan sepatutnya diketepikan. Responden menentang permohonan perayu atas alasan ia adalah di luar aturan dan salah dari segi undang-undang. Perintah penggulungan telah disempurnakan dan dimeterai. Perayu sepatutnya merayu terhadap perintah penggulungan dan bukan memohon untuk mengenepikannya.

Diputuskan (menolak rayuan dengan kos)
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Perintah penggulungan yang telah disempurnakan dan dimeterai tidak boleh diketepikan atau dibatalkan kecuali dalam keadaan-keadaan di mana mahkamah boleh menggunakan bidangkuasa sedia adanya. Remedi yang betul yang diperuntukkan oleh Akta Syarikat 1965 adalah untuk memohon penggantungan di bawah s. 243 seperti yang ditunjukkan di dalam kes *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* atau merayu terhadap perintah penggulungan seperti di dalam kes S*ri Hartamas Development Sdn Bhd v. MBF Finance Berhad.*

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Bridon New Zealand Ltd v. Tent World Ltd [1992] 3 NZLR 725 ***(refd)***
City Audio Sdn Bhd v. Pengangkutan Cargo Udara Mas Sdn Bhd [1994] 1 AMR 8 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Duke v. Reliance Systems Ltd [1987] 2 WLR 1225 ***(refd)***
George Ward Stell Pty v. Kizkot Pty Ltd 15 ACLR 464 ***(refd)***
Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Kensington Swan v. New Zealand Fisheries Ltd [1989] 2 PRNZ 141 ***(refd)***
Krextile Holdings Pty Ltd v. Widdows [1974] VR 689 ***(refd)***

A *Morelle v. Wakeling [1955] 2 QB 379* ***(refd)***
Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd [1993] 1 CLJ 204 HC ***(refd)***
Perdana Merchant Bankers Bhd v. Maril Rionebel (M) Sdn Bhd [1995] 1 LNS 308 HC ***(refd)***
B *Re Calmex Ltd And Another v. Lila Ltd & Anor [1989] 1 All ER 485* ***(refd)***
Re Crown Bank [1890] 44 Ch D 634 ***(refd)***
Re In Intermain Properties Ltd [1986] BCLC 265 ***(refd)***
Re Intermain Properties Ltd [1986] BCLC 265 ***(refd)***
Re Kim Maxwell Ltd [1992] 1 NZLR 69 ***(refd)***
Re Rick Wilson Pty Ltd 7 ACLR 354 ***(refd)***
C *Re XL Petroleum Pty Ltd [1971] VR 560* ***(refd)***
Ross v. PJ Heeringa Ltd [1970] NZLR 170 ***(refd)***
Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***
Teng Foh v. Liwu Realty Sdn Bhd [1989] 2 CLJ 275; [1989] 2 CLJ (Rep) 564 HC ***(refd)***
D *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 2 CLJ 392 CA* ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 233, 243(1)
E Rules of the High Court 1980, O. 1 r. 2(2), O. 35 r. 2

High Court Rules [NZ], r. 486
Insolvency Rules 1986 [UK], r. 7.47(1)

Other source(s) referred to:
F 10 Atkin's *Court Forms*, 2nd edn, 1992, p 384
Derek French, *Applications to Wind Up Companies* [1993] pp 145, 146
McPherson and JO Donovan, *The Law of Company Liquidation*, 3rd edn, p 443
Palmer's *Company Law*, 24th edn, p 1389

G *For the appellant - Fahri Azzat (Farah Mohd Afzal with him); M/s Azzat & Izzat*
For the respondent - Absent

[Appeal from High Court, Kuala Lumpur; Companies (Winding-up) No: D4-28-267-2003]

H
Reported by Suhainah Wahiduddin

I

JUDGMENT

Abu Samah Nordin JCA:

[1] This appeal arose from the decision of the Kuala Lumpur High Court dismissing the appellant's application to set aside the winding up order granted against it. It concerns the power of the court to set aside a winding up order which had been perfected and duly sealed.

[2] The facts are simple and straightforward. The appellant was wound up by the court on 11 July 2003. All of the documents in relation to the winding up proceedings including the notice of demand under s. 218 of the Companies Act 1965 and the petition were duly served on the appellant but no explanation was given why it failed to appear before the court. There was no affidavit in opposition to the said petition. Neither did it appeal against the winding up order.

[3] On 10 June 2004, almost a year after the said order was made the appellant filed an application, by way of a notice of motion, to set aside the winding up order and that a new hearing date of the petition be fixed. Alternatively, it prayed that the winding up order be stayed under s. 243 of the Companies Act 1965.

[4] The affidavit in support of the application dated 10 June 2004 was affirmed by one Noor Salamah binti Bunnawi who claimed to be a director of the appellant and that she was duly authorised to affirm the affidavit by the said appellant. She further claimed that the facts deposed therein were based on the appellant's record and documents in her possession.

[5] She affirmed the affidavit notwithstanding the clear provision of s. 233 of the Companies Act 1965 which states that where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all of the properties and things in action to which the company is or appears to be entitled. In *Sri Hartamas DVPT Sdn Bhd v. MBF Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 the Supreme Court (as it then was) held that, "after a winding up order is made, generally speaking no one but the liquidator can act on behalf of the company".

[6] The application is based on the ground that the appellant had no knowledge of the winding up proceedings as it had handed over the s. 218 notice served on it to a third party, ie, Mohd Najib bin Abu Bakar, who had promised to take the necessary actions to oppose the petition. It was therefore submitted that this was an order made in default and should be set aside. The appellant only knew of the winding up order after one of its directors, namely Anuar bin Abdullah discovered in January 2004 that his name had been blacklisted as being one of the directors of the appellant.

[7] Noor Salamah binti Bunnawi did not in her affidavit state that she was a creditor or a contributory of the appellant. It is necessary to disclose this fact as only the liquidator or any creditor or contributory is entitled to apply for a stay of the winding up order under s. 243 of the Companies Act 1965. A director is not qualified and has no *locus standi* to apply for a stay of the winding upn order under s. 243 of the said Act: See *Sri Hartamas Development Sdn Bhd*, *supra*.

[8] The respondent opposed the application on the ground that it was irregular and wrong in law. The winding up order had been duly perfected and sealed. The appellant should have appealed against the said winding up order instead of applying to have it set aside: see *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 2 CLJ 392, *Perdana Merchant Bankers Bhd v. Maril Rionebel (M) Sdn Bhd* [1995] 1 LNS 308. In *Vijayalaksmi*'s case, *supra*, the Court of Appeal held that a winding up order cannot be discharged or rescinded after it had been made and that the only remedy is to apply for a stay of proceedings under s. 243(1) of the Companies Act 1965.

[9] The appellant on the other hand relied on the following cases: *Teng Foh v. Liwu Realty Sdn Bhd* [1989] 2 CLJ 275; [1989] 2 CLJ (Rep) 564, *Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd* [1993] 1 CLJ 204 and C*ity Audio Sdn Bhd v. Pengangkutan Cargo Udara Mas Sdn Bhd* [1994] 1 AMR 8, supp 355. In all these cases the High Court had set aside the respective winding up orders upon application in the same proceedings rather than by way of an appeal.

[10] The appellant also relied on some foreign authorities, namely, *Bridon New Zealand Ltd v. Tent World Ltd* [1992] 3 NZLR 725, *Re Calmex Ltd and Another v. Lila Ltd & Anor* [1989] 1 All ER 485, *George Ward Stell Pty v. Kizkot Pty Ltd* 15 ACLR 464, and *Re Rick Wilson Pty Ltd* 7 ACLR 354.

[11] The learned High Court judge held that he was bound by the decision of the Court of Appeal in *Vijayalaksmi*'s case and that the cases relied upon by the appellant can no longer be considered good law. He accordingly dismissed the application with costs.

[12] Before us, it was submitted that *Vijayalaksmi*'s case was decided *per incuriam*. What then is *per incuriam*?. Sir John Donaldson MR in the English Court of Appeal in *Duke v. Reliance Systems Ltd* [1987] 2 WLR 1225 explained it as follows:

> I have always understood that the doctrine of *per incuriam* only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is *per incuriam*. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might here reached a different conclusion. That appears to me to be the position at which we have arrived today.

[13] The abovesaid passage had been reproduced *verbatim* and approved by the Supreme Court (as it then was) in the *Government of Malaysia v. Lim Kit Siang & Another Case v. Lim Kit Siang* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 at p. 102. Abdoolcader SCJ in that case further explained the words *per incuriam* thus:

> "*Per incuriam*" is only Latin for "through want of care" or "through inadvertence" or "by mistake".

[14] Sir Raymond Evershed MR in *Morelle v. Wakeling* [1955] 2 QB 379, which was referred to by the Federal Court in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 construed the words *per incuriam* as a "decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong".

[15] It had not been shown to us that *Vijayalaksmi*'s case was decided *per incuriam*. We were not referred to any other case previously decided by this court or the Federal Court which had decided otherwise. It was not submitted to us that *Vijayalaksmi*'s case was decided in contravention of any statutory provisions. This court in *Vijayalaksmi*'s case had considered the relevant provisions

of the Companies Act 1965, the Companies Act 1948 (UK), the Insolvency Rules 1986 as well as cases both in the United Kingdom and Australia before holding that a winding up order cannot be discharged or rescinded after it had been made. It pointed out that there is no rule of practice or statutory provision in this country which is equivalent to r. 7.47(1) of the English Insolvency Rules 1986, which provides that "every court having jurisdiction under the Act to wind up companies may review or vary an order made by it in the exercise of that jurisdiction". A statement of law, though orbiter and not binding as a precedent may still be of a persuasive value. Thus any reliance on English cases decided pursuant to the Insolvency Rules 1986 in furtherance of an argument that our court has the power to set aside a winding up order after it had been made, perfected and duly sealed would be of no consequence. *Re Calmex Ltd and Another*, *supra* was a decision based on r. 7.47 of the Insolvency Rules 1986.

[16] McPherson and JO Donovan, *The Law of Company Liquidation* (3rd edn) at the footnote of p. 443, states:

> It is improper to apply for an order rescinding the winding-up order: *Re Baxters* [1898] WN 60. Compare *Re Nicholls Pty Ltd & The Companies Act* [1982] 7 ACLR 76. As to termination or rescission of a winding up order, see *Quicksafe Freightlines Pte Ltd v. Shell Company of Australia Ltd* [1985] 3 ACLC 257 which confirms that s. 383 provides only for a stay or termination of the winding up. It does not contemplate that the winding up might be rescinded or set aside.

[17] The power of the court to set aside or rescind a winding up order under its inherent jurisdiction after it has been made is not unlimited. There is ample authority in support of this. Derek French in his book, *Applications to wind up Companies* [1993] at p. 145 illustrates some of the instances in which the court had exercised its inherent jurisdiction to set aside a winding up order:

> The court has an inherent jurisdiction to set aside an order which it has made if the order is so fundamentally defective that it should be treated as null (*Re South African Syndicate Ltd* [1883] 28 SJ 152, in which a contributory's petition had been presented by a person who was in fact disqualified from petitioning by what is now the Insolvency Act 1986, s. 124(2); *Re Blatt Ray Inc* [1939] 20 CBR 447, in which a contributory's petition had been presented by a person who was not a contributory; *Re Samoana Press Co Ltd* [1987] 4 NZCLC 64 at p. 119, in which the petition had not been served on the company; in *Re KW and LM Powell Ltd* [1983]

1 NZCLC 98 at p. 704, in which an application was made but there was no evidence of any miscarriage of justice calling for the exercise of the jurisdiction). Also, a fundamentally defective winding up order may be rescinded under the power to rescind given by the Insolvency Rules 1986, r. 7.47(1), which is discussed in 5.3 (*Re Calmex Ltd* [1989] 1 All ER 485).

[18] Palmer's *Company Law* (24th edn) at p. 1389 states:

The court has inherent power to rectify or rescind an order before it is drawn up ... The court can correct an order even after it has been drawn up if it does not express its intention.

Apart from this an order cannot be rescinded after it has been drawn up even though it was obtained by mistake or is bad on the face of it. The court has no jurisdiction to rehear a case after the order has been perfected. Any further proceedings to discharge or vary or challenge the order must be by way of appeal or an application to stay proceedings under s. 147 of the Act.

[19] *Sri Hartamas Development Sdn Bhd*, *supra*, is a case in point where the appellant appealed against the winding up order made against it.

[20] In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 Mohd Azmi, FCJ at p. 93 cautioned against any attempt to widen the door of the inherent jurisdiction and discretionary jurisdiction of the superior courts to set aside a defective order without recourse to normal appeal procedure:

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[21] In *Bridon New Zealand Ltd v. Tent World Ltd, supra*, the respondent was wound up without its knowledge as the winding up proceedings were served at its previous address, which was also the address of its principal shareholder, one Mr. Artus. He had moved from that address following a fire. Upon learning of the winding up order he promptly applied to set aside or stay the order. All parties, including the Official Assignee agreed that the order should be stayed. Thomas J granted an interim order staying the winding up order.

[22] But Thomas J then went on to consider whether the winding up order could be rescinded rather than stayed. He acknowledged that there is ample authority that a winding up order cannot be rescinded: see *Kensington Swan v. New Zealand Fisheries Ltd* [1989] 2 PRNZ 141, *Re Crown Bank* [1890] 44 Ch D 634, *Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689, *Re XL Petroleum Pty Ltd* [1971] VR 560, *Ross v. P'ƒ Heeringa Ltd* [1970] NZLR 170, *Re Intermain Properties Ltd* [1986] BCLC 265, *Re Kim Maxwell Ltd* [1992] 1 NZLR 69. Mr Hickey, counsel for the contributory in that case pointed out that a winding up order could be rescinded if it has not been sealed or otherwise perfected.

[23] Thomas J nevertheless proceeded to make on order rescinding the winding up order pursuant to r. 486 of the High Court Rules which states that any verdict or judgment obtained where one party does not appear at the trial may be set aside or varied by the court on such terms as may seem just if it appears to the court that there has, or may have been, a miscarriage of justice. He was of the view, that having regard to r. 7.47(1) of the Insolvency Rules 1986, it was open to the court to review the rule and discard it on the basis that it "has outlived its usefulness". But at the end of his judgment he did take into account Mr Hickey's submission and made an alternative order recalling and setting aside the winding up order pursuant to R540 on the ground that it has not be drawn up and sealed. This is what Thomas J said at p. 732:

> Even if I am wrong in rescinding the order ... I consider that it is open to me to recall and set aside the order pursuant to R540. Under this rule, the Court may recall a judgment at any time before a formal record of it has been drawn up and sealed.

The weight of authorities seems to suggest that a winding up order which had been perfected and sealed cannot be set aside or rescinded. A

[24] The High Court cases relied upon by the appellant are clearly distinguishable. The issue whether the High Court has the jurisdiction to set aside a winding up after it was perfected and duly sealed was not considered in *Teng Foh t/a Teng Foh Construction v. Liwu Realty Sdn Bhd*, *supra* and in *Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd*, *supra*. In *City Audio Sdn Bhd v. Pengangkutan Kargo Udara Mas Sdn Bhd*, *supra* the High Court held that it has jurisdiction to set aside a winding order made in default under O. 35 r. 2 of the Rules of the High Court 1980 (RHC). In that case the order was made in absence of respondent's counsel who was taken ill. It must be noted that all these cases were decided before the decision of the Court of Appeal in *Vijayalaksmi*'s case. B C D

[25] There is no express provision in the Companies Act 1965 or in the Companies (Winding Up) Rules 1972 similar to r. 7.47(1) of the Insolvency Rules 1986. In the United Kingdom, before the Insolvency Rules 1986 came into force a winding up order could not be rescinded after it had been drawn up. The only remedy was to apply for a stay: *Re In Intermain Properties Ltd* [1986] BCLC 265 or to appeal. See also 10 Atkin's *Court Forms* (2nd edn) (1992 issue) at p. 384; Derek French, *Applications to Wind Up Companies*, p. 146. Until a similar provision is introduced into our Companies Act 1965 or Companies (Winding Up) Rules 1972 we are of the considered view that a winding up which had been perfected and duly sealed cannot be set aside or rescinded save in those circumstances where the court may exercise its inherent jurisdiction. Order 35 r. 2 of the RHC cannot be invoked to set aside a winding up order on the ground that it was made in default as the Companies Act 1965, being a special law on matters pertaining to companies winding up does not expressly provide for it. Order 1 r. 2(2) of the RHC states that the High Court rules shall have no effect in relation to proceedings in respect of which rules have been made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings. The proper remedy which is provided by the Companies Act 1965 is to apply for a stay under s. 243 as was pointed out in *Vijayalaksmi*'s case or to appeal against the winding up order as was done in *Sri Hartamas Development Sdn* E F G H I

Bhd. The court should refrain from the temptations of deciding a case on the basis that a provision similar to r. 7.47 of the Insolvency Rules 1986 should have been introduced into the Companies Act 1965 or the Companies (Winding Up) Rules 1972.

[26] For the above reasons we dismissed the appeal with costs and ordered that the deposit be paid to the respondent on account of taxed costs.